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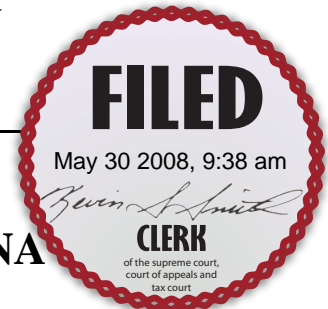
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**IN THE
COURT OF APPEALS OF INDIANA**



KELLY S. THOMAS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A05-0709-CR-546

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0407-MR-95

May 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kelly S. Thomas appeals his felony murder conviction. We affirm.¹

Issues

- I. Did Thomas waive review of the trial court's denial of his motion for continuance?
- II. Did the trial court violate Thomas's constitutional right of confrontation?

Facts and Procedural History

In May 2003, Gwendolyn Hunt rented an apartment on Harrison Street in Elkhart. She and Joshua Shaw manufactured and sold crack cocaine, and they often hid drugs and money in the apartment. On May 19, 2003, Christy Tice, a resident of the apartment above Hunt's, heard Hunt tell someone to "get off her," and then she heard and felt a "thump." Tr., Vol. I at 204.² Christy's husband, David, went downstairs to check on Hunt, but when he heard voices and a loud slamming sound, he returned to his apartment and called the police. Later, when David and Christy went downstairs, they found the door to Hunt's apartment

¹ We note that Thomas's counsel failed to include a complete table of contents for each volume of the supplemental appendix, as required by Indiana Appellate Rule 51(D). Moreover, the table of contents contained in the first volume of the supplemental appendix vaguely labels two hundred pages of various documents as "Other Documents in Record." See Ind. App. Rule 50(C) ("The table of contents shall specifically identify each item contained in the Appendix, including the item's date."). We admonish Thomas's counsel to pay closer attention to the applicable rules in preparing future appeals.

² As noted by Thomas in his appellant's brief, Volume I of the trial transcript contains pages 1 through 239. Volume II begins with page 1 as well, apparently because a second court reporter transcribed the trial proceedings from that point forward. Generally, transcripts should be prepared with consecutive page numbers from beginning to end, no matter how many volumes the entire transcript requires. See Ind. Appellate Rule 28(A)(2). To avoid confusion, we have included the applicable volume number for each citation to the transcript.

broken and hanging from the hinges. Hunt was lying on the floor bleeding and barely breathing. She later died of a gunshot wound to the back of her head.

On July 27, 2004, the State charged Thomas, Kevin Taylor, and Stacy Orue with felony murder. They were tried together, and on February 4, 2005, a jury found each of them guilty as charged. On March 3, 2005, the trial court sentenced Thomas to sixty-five years, Taylor to sixty-five years, and Orue to forty years. Thomas appealed his conviction, and in early 2006, another panel of this Court reversed Thomas's conviction and remanded for a new trial. *See Thomas v. State*, No. 20A03-0503-CR-138, slip op. at 5 (Ind. Ct. App. Feb. 3, 2006).³

On June 11, 2007, Thomas's second jury trial began. On June 12, 2007, the State informed the trial court that it expected Orue to testify against Thomas and asked the court to grant her immunity.⁴ Thomas moved for a mistrial, or in the alternative, for a continuance. Thomas's counsel argued, and the State conceded, that as recently as one day earlier, Orue had confirmed to Thomas's counsel that she was not present when Hunt was murdered and would say nothing to incriminate Thomas if called to testify. The trial court, noting that "sometimes co-defendants change their mind[s] in the middle of a trial[,]," denied Thomas's motion for mistrial and granted the State's request for immunity. *Tr.*, Vol. II at 186. The court also denied Thomas's motion for continuance "at this point" but offered to order a

³ In the appeal of his first felony murder conviction, Thomas contended that the conviction could not stand because the trial court had failed to instruct the jury on the elements of robbery, the underlying felony of which Thomas was accused. Another panel of this court concluded that this omission "resulted in a denial of fundamental due process to Thomas" and granted him a new trial. *See Thomas*, slip op. at 5.

⁴ At the time of Thomas's second trial, Orue's petition for post-conviction relief was pending in the trial court.

recess so that Thomas could depose Orue, but Thomas apparently failed to take advantage of this offer. *Id.*

Orue testified as to the events of May 19, 2003, as follows: She was with Taylor and Thomas that day. All three of them had previously purchased drugs from Hunt. They drove to the Harrison Street apartment building. Orue and Thomas went upstairs to Hunt's apartment while Taylor waited in his truck outside. When Hunt opened the door, Thomas forced his way into the apartment. Orue stood in the hallway "crying and shaking[.]" *Id.* at 201-02. She could see Hunt lying on the floor bleeding from her head and trying to get up. Taylor came upstairs, stood in the hallway with Orue, and told her to be quiet. Hunt made it to her feet and was facing Orue when Thomas shot her in the back of the head. Hunt fell to the floor, and Thomas, Taylor, and Orue fled the apartment building and drove away in Taylor's truck.

On cross-examination, Orue admitted that from the time of her arrest, she had consistently denied being present at the scene of the crime, including during an interview with Thomas's counsel just one day earlier. She claimed that she did not inform Thomas's counsel that she had decided to testify against Thomas because Thomas was in a nearby cell, and she feared retaliation.

On June 15, 2007, the jury found Thomas guilty as charged. He now appeals.

Discussion and Decision

I. Motion for Continuance

Upon learning of Orue's decision during trial to testify against him, Thomas requested a continuance, which the trial court denied. While Thomas admits that Orue's name was on the State's witness list, he alleges that she was in essence a "surprise" witness because of her apparent last-minute decision to testify as to Thomas's involvement in Hunt's murder. Therefore, he contends that the trial court erred in denying his motion for a continuance to prepare for Orue's testimony.

The grant or denial of a motion for continuance lies within the sound discretion of the trial court. *Macklin v. State*, 701 N.E.2d 1247, 1250 (Ind. Ct. App. 1998). We will not disturb the trial court's decision absent a clear demonstration that the trial court abused its discretion. *Id.* Also, for the denial of a continuance to constitute reversible error, the defendant must establish that he was prejudiced by the denial. *Id.*

In its June 12, 2007, order summarizing that day's proceedings, the trial court stated in pertinent part,

[O]ut of the jury's presence, witness, Stacy Orue, appears and is granted immunity by the State of Indiana. The Defense then requests an opportunity to depose the witness and the Court indicates it will permit an opportunity to depose the witness.

At the close of the Court recess and before the trial recesses in the jury's presence, the Defendant also requests a mistrial. The request for a mistrial is denied; the Court notes that counsel for the Defendant is requesting a mistrial due to the change in position of witness, Stacy Orue, who previously indicated she would not testify but then indicated she would in fact testify. The Court notes that a continuance is the appropriate remedy for such issues and the Court indicates clearly to counsel that it will permit a recess of the trial so that Attorney Leatherman can depose witness Orue.

Appellant's Supp. App. at 177.⁵

A defendant who is given the opportunity to depose a surprise witness and declines to do so cannot claim prejudice when the court allows the witness to testify. *Davis v. State*, 714 N.E.2d 717, 723 (Ind. Ct. App. 1999), *trans. denied*. Here, the trial court offered Thomas the opportunity to depose Orue, and he did not avail himself of that opportunity. Thus, he has waived any claim of abuse of discretion.

Waiver notwithstanding, Thomas has failed to demonstrate that he was prejudiced by the trial court's ruling. First, he does not explain how he might have better defended against Orue's testimony if he had been granted a continuance. Second, Orue's testimony, while detrimental to Thomas's case, was merely cumulative of a wealth of additional evidence presented by the State. For example, Michael Ginyard testified that shortly before Hunt's murder, Thomas had asked him to assist him in stealing drugs and money from a person who lived on Harrison Street. Tr., Vol. III at 333-34. Ginyard also testified that when he saw Thomas a few days later, Thomas told him that the robbery "didn't go right." *Id.* at 337. Thomas's girlfriend testified that she saw Thomas carrying a gun on the day of Hunt's murder, and that he was "really nervous and acting strange" and said that he had "done

⁵ The proceedings as recorded in the trial transcript vary slightly from the events recorded by the trial court in its summary order of June 12, 2007. The trial court recounts having "clearly" offered Thomas the opportunity for a recess to depose Orue. Appellant's Supp. App. at 177. According to the transcript, the trial court denied Thomas's motion for continuance prior to Orue's testimony but indicated that it would be open to considering additional motions for mistrial or continuance after her direct examination. *See* Tr., Vol. II at 186 ("Your request for mistrial *at this point* is denied. Your request to continue the trial *at this point* is denied. Let me emphasize *at this point*.") (emphases added). Also, the State indicated that it would not necessarily object to a motion for recess to depose Orue after her initial testimony was entered into the record. *See id.* at 184 ("[I]f after [Orue] testifies there comes a time when there needs to be a brief recess, or even a continuance for the defendant to be able to follow-up on something, that's fine. We'll cross that bridge when we come to it."). On appeal, Thomas does not object to the trial court's characterization of events, however, so we will presume them to be accurate for purposes of this opinion.

something.” *Id.* at 351-56. Another witness, Carolyn Hickman, testified that immediately after hearing a loud noise coming from Hunt’s apartment building, she saw Thomas, Orue, and Taylor running from the building, and she saw that Thomas had a gun. Tr., Vol. II at 240-49. Hickman and Telford Fager saw Thomas and Taylor with a large amount of crack cocaine and a lot of cash on the evening of Hunt’s murder. Tr., Vol. III at 264-65, 305-07. That same night, Fager heard Thomas say, “She got what she deserved,” and Thomas confronted Fager, stating, “If [you] say anything, [you’re] next.” *Id.* at 307-11. Also, John Wise testified that when he was in a holding cell with Thomas, he heard Thomas make several incriminating statements to Taylor and Orue. *Id.* at 372-80.

In light of the above, even if Thomas had not waived review of the trial court’s denial of a continuance, he has failed to show that he was prejudiced by that ruling. Orue’s testimony was merely cumulative of the State’s plentiful evidence against Thomas, and thus, his claim must fail. *See Jackson v. State*, 758 N.E.2d 1030, 1035 (Ind. Ct. App. 2001) (upholding defendant’s conviction where there was substantial, cumulative evidence of defendant’s guilt apart from evidence related to continuance motion).

II. Right to Confront Witnesses

Pursuant to the Sixth Amendment to the U.S. Constitution, “in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” Similarly, Article 1, Section 13 of the Indiana Constitution states that all criminal defendants shall have the right to “meet the witnesses face to face.” The right to confront witnesses includes the right to a full, adequate, and effective cross-examination. *Hodges v.*

State, 524 N.E.2d 774, 781 (Ind. 1998). Thomas contends that the trial court’s denial of his motion for continuance prevented him from effectively cross-examining Orue because he had “no chance whatsoever for discovery or to prepare any defense.” Appellant’s Br. at 8.

In his cross-examination of Orue, Thomas was able to challenge her credibility. He asked her about the potential benefits of the State’s grant of immunity in exchange for her testimony against Thomas, her denial to authorities of her own involvement in Hunt’s murder from the time of her arrest until the day before her testimony in this trial, and her past participation in illegal behavior such as drug use and prostitution. As the State points out, the content of Orue’s testimony should not have been surprising to Thomas in the sense that it was consistent with the physical evidence and the testimony of the other witnesses in this case. Also, Thomas fails to explain how his cross-examination would have been more effective had he been granted a continuance to prepare.

In sum, Thomas waived his claim of abuse of discretion with regard to the trial court’s denial of his motion for continuance, and waiver notwithstanding, his claim would fail because he has shown no prejudice as a result of the trial court’s ruling. Moreover, for the reasons set forth above, we cannot conclude that Thomas was denied his right to full, adequate and effective cross-examination of Orue.

Affirmed.

BARNES, J., and BRADFORD, J., concur.